Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

DICK W. ARRINGTON, PETITIONER

*v.*

SOUTHWESTERN BELL TELEPHONE COMPANY

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

(1) Whether the Trial Court erred in granting the Defendant's Motion for Summary Judgment.

## PARTIES TO THE PROCEEDING

The caption of this case names all the parties to the proceeding in the court whose judgment is sought to be reviewed.

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Petitioner, DICK W. ARRINGTON, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 26, 2004.

## OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Fifth Circuit, styled ***Dick Arrington v. Southwestern Bell Telephone Company,*** is attached to this Petition at Appendix (App.) p. 1a. The Fifth Circuit affirmed the May 11, 2003, decision of the United States District Court for the Western District of Texas, Midland-Odessa Division in ***Dick Arrington v. Southwestern Bell Telephone Company***. *See* App. p. 14a.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit was entered February 26, 2004. This Petition is filed within ninety (90) days after entry of the Judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

This appeal involves 42 USCS § 12112 (2004) which is attached to this petition at App. p. 21a.

## STATEMENT OF THE CASE

### 1. Nature of the Case

Dick Arrington filed a lawsuit against Southwestern Bell Telephone Company alleging retaliation and violations of the Americans with Disabilities Act. Arrington claimed the company terminated him because of his diabetes and in retaliation for filing an EEOC complaint.

### 2. Course of Proceedings

Arrington filed a lawsuit against Southwestern Bell alleging violations of the ADA and retaliation. (CR 183-195).

After discovery, Defendant filed a Motion for Summary Judgment and Exhibits. (CR 67-181). Plaintiff filed an opposing brief. (CR 207-293).

The Court granted summary judgment and entered judgment on behalf of Southwestern Bell Telephone Company. (CR 534-540). Arrington timely filed the Notice of Appeal. (CR 548-549). The Fifth Circuit affirmed the judgment on February 26, 2004.

### 3. Statement of Facts

#### A. Undisputed Facts

Arrington, a diabetic, was an employee of the Defendant Southwestern Bell Telephone Company from 1974 to 1998. (CR 535). From 1979 onwards, Arrington's designation at Southwestern Bell was "Customer Services Technician," or "CST"." (CR 535). The CST

position involved the installation and repair of phones and phone lines. (CR 535). In 1986, the Appellant was diagnosed with diabetes. (CR 535). Beginning in 1987, numerous complaints were lodged pertaining to his physical appearance and work performance. (CR 535).

In 1995, Arrington developed diabetic ulcers and had to take leave from his job. (CR 535). Following a dispute with Southwestern Bell as to his date of return to work, he was discharged from his employment. (CR 535). He then filed a complaint with the Equal Employment Opportunity Commission (EEOC) on September 9, 1996. (CR 535). However, the parties entered into a general settlement agreement and Arrington was reinstated in his previous job. (CR 535).

Subsequent to his reinstatement, Arrington continued to receive complaints from customers about either his appearance or his work performance. (CR 536). One such incident in 1997 led to Southwestern Bell's management placing the Appellant on "Decision Making Leave," a one-year probationary period during which he was subject to dismissal for unsatisfactory performance of his job duties. (536). On June 25, 1998, another customer filed a complaint and Arrington was suspended on the same day. (CR 536) At that point, the Defendant's management offered Arrington a position as "Supplies Attendant," a job that did not involve the CST's customer contact or productivity requirements. (CR536). When Arrington refused this alternate employment at Southwestern Bell, the Defendant proceeded to recommend his permanent dismissal from the company. (CR 536). On November 12, 1998, Arrington was terminated from his employment at Southwestern Bell. (CR 536).

**B. Factors that Negate Summary Judgment**

Arrington has sued Southwestern Bell under the Americans with Disabilities Act and has set forth a claim of retaliation. (CR 183-195). The ADA claim alleges Arrington was terminated because of his insulin dependent diabetes. (CR 183-195). The retaliation claim alleges he was terminated because he filed an EEOC complaint against the company. (CR 183-195). As part of the retaliation claim, the Plaintiff alleges that upon his return to work in 1997, the company attempted to force his resignation by harassing him and treating him different from other employees. (CR 183-195).

The fact that Plaintiff has insulin dependent diabetes is not a dispute. (CR 228, 237, 243-249). The Plaintiff filed an EEOC complaint in 1996. (CR 230, 239, 248, 292). In 1997 in and all disputes between the company and Arrington were settled. (CR 292). Arrington was allowed to return to work based upon the general settlement agreement. (CR 292).

Shortly after Arrington returned to work, he was immediately sent home for alleged improper footwear. (CR 230, 239, 257, R2 121). Other employees, who were wearing similar footwear were not sent home. (CR 230, 257, R2 151).

Arrington was not allowed the same privileges as other employees in matters relating to disability and sickness. (CR 229-230, 239, 257). Specifically, he was not allowed to work through his lunch or late in order to cover time spent on appointments with physicians so that he would not suffer a loss in pay. (CR 229-230, 239, 257). Other employees were allowed to work through their

lunches or work late so that they could make their doctor's appointments without losing pay. (CR 229-230, 239, 257). Arrington was the only employee in his area not allowed to work overtime. (CR 288).

Arrington was issued a performance notice based on his productivity. Arrington's productivity is also subject to dispute. (CR 229-230, 239). He has testified that other employees who were close to him in productivity were not disciplined. (CR 229-230). Clay Everett testified that as far as productivity, Dick Arrington was not the worst. (CR 266-268). At one point in time, Arrington was one of the slowest in Midland however he was making a concerted effort to improve. (CR 266-268). He had marked improvement as far as improving his productivity. (CR 266-268). However, Arrington was terminated before he was able to get to the mark where he needed to be. (CR 266-268). Everett also testified as far as technicians, he was in the middle of the pack. (CR 266-268).

Company representatives have testified that Arrington was one of the slowest in Midland, Texas and they based their results on his productivity in this area. However, the interpretation of results raises a question of fact as to whether Arrington's productivity was a valid factor in his termination.

Southwestern Bell had Arrington take an independent medical examine and a functional capacity examine. (CR 229-230, 239, 258). A third examination was scheduled in Big Spring, Texas. (CR 229-230, 239). The functional capacity examine lasted eight hours. (CR 229-230, 258). Other employees functional capacity examine lasted only one hour. (CR 229-230, 239). A third

examination was scheduled and ultimately canceled due to a union protest. (CR 258).

Part of the reason Arrington was terminated was customer complaints. He testified in his deposition he believes the complaints against him were solicited. (R2 151). Specifically, he indicated that if a repairman has a problem the supervisor usually informs the union and then an investigation is performed. Arrington claims that Southwestern Bell did not investigate his complaints in this matter. (R2 151). Clay Everett testified that in his opinion the company did not perform an investigation on at least one of these events, specifically the Salgado incident. (CR 269). Arrington contests Defendant's allegations that the customer was upset because of Plaintiff's appearance. Specifically, he contends that Mr. Salgado was upset because his doorbell wire was cut. (CR 230-231).

As a result of this complaint the company placed Plaintiff on DML, although he was not on any step of positive discipline at that time. (CR 230-231). Again, there is a question as to whether or not Plaintiff was being treated differently from other employees in regards to disciplining.

Arrington has alleged that the company had not issued him proper equipment to perform his job. (CR 258, R2 159). Arrington testified in his deposition that he was provided a Chevrolet Van. (R2 159). Everyone else was driving a cable truck. (R2 159). His van was retired. (R2 159). Furthermore, Arrington testified that he was provided substandard equipment in an effort to provoke him. (CR 265, R2 159). The van was not air conditioned. (CR 265).

The company had Arrington ride along with another employee. (R2 153). According to the company, the purpose of the ride along is to show the employee how to become more productive. Arrington however testified that he believes the company had him do a ride along to test, provoke and humiliate him. (R2 153). He testified that he was number 5 out of seniority. ( R2 153).

The straw that broke the camel's back has been referred to as the Prickle incident. Evidently, the customer changed her request when Arrington arrived at the scene. (CR 231, R2 154). Arrington was not able to finish the job. At this time, Arrington was not allowed to work overtime. (CR 239). The customer was angry with Arrington because he did not stay and finish. (CR 239, 283). The customer did not initiate the complaint but was contacted by Junior Brown. (CR 239, R2 174). According to Arrington and Clay Everett, the customer was mad because Arrington did not finish the job. (CR 239).

Part of the decision to terminate Arrington, was a result of his coding on the date of the Prickle incident. (R2 154-155). Both Arrington and Everett testified that he did not falsely code his work. (CR 239). Specifically, Arrington placed the letters "O.T." indicating that he was not allowed to work overtime. (CR 239, R2 154-155). As a result of the Prickle incident, he was suspended on June 25, 1998. This incident raises relevant fact issues in that Arrington was disciplined for his coding. Again, he was not allowed to work overtime. Furthermore, there is the question as to whether he performed improperly on this job or whether the customer was simply mad because he could not finish the job.

Arrington was offered the position of supplies attendant. (R2 155-156). He believed the supplies attendant position to be demotion. (R2 155-156). This position paid less and had significantly different job responsibilities. (R2 155-156).

Arrington also testified that he was singled out because of his weight and beard length. (CR 229, 237). The company countered in their depositions that Plaintiff was counseled on his appearance based on the standards for Midland, Texas, not other areas. However, again, this raises a question of fact as to Arrington's different treatment.

This brief recitation of the factors, in no means, covers all the facts in this lengthy case. However, these are the pertinent factors Appellant believes negate summary judgment.

Appellant will next analyze the elements for an ADA claim and retaliation claim and show that there are material questions of fact which should negate summary judgment.

## REASONS FOR GRANTING THE WRIT

### (1) The Trial Court erred in granting Defendant's Motion for Summary Judgment

#### 1. Standard of Review

The Court reviews de novo the District Court's grant of summary judgment, applying the same standard as the District Court. *Fabela v. Socorro I.S.D.* 329 F.3d 409, 414 (5th Cir. 2003). In order to determine if summary judgment was properly entered in favor of Southwestern Bell, the Court reviews the record in the light most favorable to the Plaintiff and resolves all reasonable inferences in his favor. *Id.* It is well settled that at the summary judgment stage of litigation the function of the trial bench or reviewing court is not to step into the stead of the jury and weigh the evidence in search of the truth, but is instead to determine whether there exists a genuine issue for trial. *Id.*

Summary Judgment is not favored in claims of employment discrimination, it is nonetheless proper when "there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. *Fierros v. Tex. Dept. of Health*, 274 F.3d 187, 190 (5th Cir. 2001). In making a summary judgment determination, doubts are to be resolved in favor of the nonmoving party and any reasonable inferences are to be drawn in favor of that party. *Id.* The Supreme Court recently emphasized the paramount role that juries play in Title VII cases, stressing that in evaluating summary judgment evidence, courts must refrain from the making of credibility determinations, the weighing of the

evidence, and the drawing of legitimate inferences from the facts which are jury's functions not those of the Judge.

**2. Retaliation**

In order to establish a prima facie case of retaliation, a Plaintiff must demonstrate: (1) that he engaged in activity protected by Title VII, (2) that an adverse employment action occurred and (3) a causal link existed between the protected activity and the adverse employment action. *Id at 191.* The Fifth Circuit has determined that only ultimate employment decisions such as hiring, granting leave, discharging, promoting and compensating satisfy the adverse employment action element of a prima facie case of retaliation. *Id.*

The burden of proof in retaliation cases depends on the nature of Plaintiff's evidence supporting the causation element. If the Plaintiff seeks to establish causation by circumstantial evidence, the burden shifting frame work of McDonnell Douglas applies. *Id.* The Plaintiff carries the initial burden of establishing a prima facie case of retaliation. *Id.* The employer can rebut the prima facie showing and the Plaintiff then has the burden of proving that the Title VII protected activity was a "but for" cause of the employment decision. *Id.* If the Plaintiff presents evidence supporting the prima facie case, plus evidence that the reasons given by the employer for the adverse employment action were pretextual, a jury may infer the existence of the "but for" causation.

If on the other hand the Plaintiff presents direct evidence that the employer's motivation for the adverse action was at least in part retaliatory, then the McDonnell

Douglas frame work does not apply. *Id.* In such direct evidence cases the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor. *Id.*

**3. Protected Activity**

Arrington filed an EEOC complaint in 1996. This is a protected activity. Furthermore, the filing of an internal discrimination complaint is a protected activity. *Fierros at 194*. Appellant has provided the District Court with evidence of an agreement which was the result of an EEOC complaint and an internal grievance. (CR 292-293).

**4. Adverse Employment Action**

Arrington proved that he suffered an adverse employment action. Specifically, he was terminated from Southwestern Bell.

A Federal District Court has found a fact issue as to whether the Plaintiff suffered an adverse action when he was transferred to a different location, his work hours were changed from 9:30 a.m. –6:00p.m. to 5:00a.m.-1:30 p.m. and he had slightly different job duties. *Florence v. Runyon* 990 F.Supp 485 (N.D. Tex. 1997).

**5. Causal Link Between Protected Activity and Adverse Employment Action**

The causal link required by the third prong of the prima facie case does not rise to the level of a "but for" standard. *Gee v. Principi*, 289 F.3d 342, 346. The Plaintiff

needs to prove that his protected activity was the sole factor motivating the employer's challenged decision in order to establish the causal link element of a prima facie case.

Arrington presented sufficient summary judgment evidence to raise material fact issue. There is evidence that raises the issue of whether Arrington was treated differently from other employees, whether the Defendant solicited complaints, and whether or not he was truly nonproductive. Further, Arrington has raised evidence regarding the alleged coding violations.

**6. "But For" Analysis**

If the Plaintiff presents evidence supporting the prima facie case plus evidence that the reasons given by the employer for the adverse employment action were pretextual, a jury may infer the existence of the "but for" causation. *Fierros at 191-192.* Arrington presented summary judgment evidence which raised a material question of fact as to the "but for" issue. Specifically, Arrington produced evidence that he was treated differently when he returned to work after filing an EEOC claim and an internal grievance. Both Arrington and Clay Everett, the union president, testified that the company was not performing proper investigations. Arrington argued he was not as productive not only because of his diabetic condition but because he was not given the proper equipment. Arrington produced evidence that employees with similar appearances were treated differently. He raised more than a scintilla of evidence regarding the "but for" claim.

Finally, there is a material question of fact as to when the adverse employment action began. Arrington returned to work in 1997 and was terminated in 1998. Arrington produced evidence that the company immediately began taking action against him after his return to work. Therefore, there is a material question of fact as to when the adverse employment action began.

**7. Americans with Disabilities Act**

The ADA prohibits discrimination against a qualified individual with a disability. The ADA defines actual disability, in relevant part, as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual." 42 U.S.C. § 12102 (2)(A).

Whether an impairment is substantially limiting is determined in light of: (1) the nature and severity of the impairment; (2) its duration or expected duration; (3) its permanent or expected permanent or long-term impact. 29 C.F.R. § 1630.2(j). "Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Id. Other activities such as standing, sitting, lifting, or reading are also considered major life activities, at least by the EEOC.

In the Supreme Court's *Murphy* and *Sutton* decisions, it concluded that the determination of whether an employee's impairment "substantially limits" one or more of the major life activities is made with reference to the mitigating measures the individual employs. *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999); *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999).

For example, in *Murphy*, the employee's high blood pressure did not substantially limit his major life activities when he was medicated, and consequently, he was not disabled under the ADA.

The ADA makes it unlawful for an employer to discriminate against an employee who is a qualified individual with a disability because of that individual's disability. 42 U.S.C § 12112 (a)(2001). To prevail on a claim under the act a Plaintiff must prove that (1) he has a disability, (2) he is qualified for the position in which he seeks employment and (3) he was discriminated against solely because of his disability. *Gonzales v. City of New Braunfels, Texas*, 176 F.3d 834, 836 (Tex. App. 1999).

The ADA also prohibits discrimination not only against employees who are actually disabled, but also against employees whom the employer "regards as" or "perceives as" being disabled. Under this "regard as" or "perceived as" provision of the ADA, a person will be treated as having a substantially limiting impairment if he shows that he: (1) has an impairment that is not substantially limiting but that the employer perceives as constituting a substantially limiting impairment; (2) has an impairment that is substantially limiting only because of the attitude of others toward such an impairment; or (3) has no impairment at all but is regarded by the employer as having a substantially limiting impairment. *Deas v. Riverwest, L.P.*, 152 F.3d 471, 475 (5th Cir. 1998), *Bridges v. City of Bossier* 92 F.3d 329, 332 (5th Cir. 1996).

The Fifth Circuit has held that insulin dependant diabetes is a disability. In the *Gonzales* case, the Court held that in determining whether an individual is disabled Court should consider a serious impairment such as

diabetes in its unmitigated state. *Gonzales Id at 837.* An insulin dependent diabetic who is deprived of insulin will lapse into a coma. Hence, in its unmitigated state, Arrington's diabetes substantially limits one or major life activities. *Id.*

It is important to note that this case was decided before the Supreme Court's decision in *Murphy* and *Sutton.*

Since Arrington has this diabetic condition, there is a material question of fact as to whether he suffers from a disability.

It is not in dispute that he was qualified for the position in which he seeks employment.

A qualified individual with a disability is a disabled person who satisfies the requisite skill, experience, education and other job related requirements of the employment position he holds or desires and who with or without reasonable accommodation can perform the essential function of that job. *Gonzales at 837.*

Under the ADA and if employee proves that his employers fail to make reasonable accommodations to the employees known physical or mental limitations, the employer will be deemed to have discriminated unless it can show that accommodation would impose an undo hardship on the operation of its business.

Arrington did not request any specific accommodations. However, a reasonable accommodation to Arrington would be to allow him addition time to complete his jobs.

An employee may also recover if he is able to show that the employer regards him as disabled or perceives him as being disabled. The summary judgment evidence showed that the company knew about Mr. Arrington's diabetes but never regarded him as being disabled.

The evidence presented by the Appellant shows that he considered himself a productive member of the Southwestern Bell team. He disputes Southwestern Bell's allegations regarding his productivity. He believes he was in the middle of the pack as related to other employees at Southwestern Bell. He only stated that his condition slowed him down but he attributed that to both his condition and age. The Defendant further testified that Appellant's absences for any medical visits were not held against him. Appellant can really raise only three questions of fact regarding whether or not Plaintiff's diabetic condition was reason for his termination. First, Arrington's diabetic condition may have contributed to his productivity. Second, Arrington testified that he needed to take frequent snack breaks and had a specialty diet because of diabetes. The company alleged, and this was denied by Arrington, that he would take picnic breaks. Finally, Arrington was treated differently from other employees.

## CONCLUSION

The District Court's Summary Judgment should be reversed because Arrington raised questions of material fact on both the discrimination claim and the retaliation claim. Specifically, Arrington proved that he engaged in an activity protected under Title VII, that an adverse employment action occurred and he raised material

questions of fact as to whether a causal link existed between the protected activity and the adverse employment action. Arrington presented summary judgment evidence that immediately upon his return to work he was sent home for improper footwear. Other employees wearing similar footwear were allowed to work. Arrington disputed the company's reasons for productivity. Arrington raised material questions of fact regarding whether or not the supply attendant position was a demotion. Arrington further testified that he was provided substandard tools and that the company harassed him by forcing ride-alongs.

Because Arrington raised material questions of fact, the Trial Court erred in granting summary judgment and this case should be reversed.

## PRAYER

Appellant requests the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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(Any footnotes follow end of each document)

No. 03-50656

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DICK W. WARRINGTON
Plaintiff-Appellant

v.

SOUTHWESTERN BELL TELEPHONE CO.
Defendant-Appellee

Filed February 26, 2004

Appeal from the United States District Court for the Western District of Texas No. MO-00-CV-57

Before KING, Chief Judge, and BENAVIDES and CLEMENT, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Dick W. Arrington appeals the district court's grant of summary judgment to Defendant-Appellee Southwestern Bell Telephone Company ("SW Bell") on his disability discrimination and retaliation claims. For the following reasons, we AFFIRM.

## I. BACKGROUND

Arrington was employed by SW Bell from 1974 to 1998. Beginning in 1979, Arrington worked as a Customer Services Technician ("CST"), installing and repairing phones and hone lines for SW Bell's customers at their homes and places of business. Arrington was diagnosed with diabetes in 1986 and his supervisor, Junior Brown, admits that he and the company were aware of this diagnosis. In fact, in December 1995, Arrington had to take disability leave due to problems associated with diabetic ulcers on his feet. After a dispute over his date of return, Arrington was discharged and filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). Arrington and SW Bell subsequently settled their dispute, and Arrington was reinstated to his position as a CST in January 1991.

SW Bell repeatedly counseled Arrington for absenteeism and productivity problems beginning in 1987. In addition, the company began to receive numerous complaints from customers about Arrington's physical appearance, attitude, and skill level in 1988, for which Arrington was also repeatedly counseled. In 1995, Arrington was informed by SW Bell that, because of his low productivity and tendency to waste time on the job, he was ineligible to work overtime until there was a "noticeable improvement" in his performance. This restriction continued to apply after Arrington was reinstated in January 1997.

In November 1997, SW Bell placed Arrington on Decision Making Leave due to a customer's complaints that Arrington mistakenly cut the customer's doorbell wire, that his appearance upset the customer's

daughter, and that he had a poor attitude Under the Leave, Arrington was given a day to decide whether her to return to work at SW Bell. He agreed to return and was placed on probation for one year, during which he was subject to dismissal for unsatisfactory performance of his job duties. Then, on June 24, 1998, Junior Brown visited a job site listed on Arrington's schedule, but he could not find Arrington. Both parties agree that Brown contacted the customer, Ms. Prickle, the next day to determine whether Arrington had, indeed, worked there. According to Brown, Prickle complained about Arrington's inability to finish the job and his rude behavior; Brown also contends that Arrington improperly coded his work for Prickle, in violation of company policy. As a result, Arrington was suspended from his CST position, and SW Bell later offered him a Supplies Attendant position, which did not involve either customer contact or productivity requirements. When Arrington refused to accept this position, SW Bell dismissed him.

After his second termination from SW Bell, Arrington initiated the present lawsuit, alleging that SW Bell violated the Americans with Disabilities Act ("ADA") by subjecting him to disparate treatment and eventually firing him because of his diabetes. Arrington also alleges that his treatment and discharge from SW Bell were improperly motivated by retaliation for his filing of an EEOC complaint in 1996. For example, Arrington believes that SW Bell solicited all of the customer complaints against him and that other, less efficient CSTs were neither disciplined nor counseled, as he was, for poor productivity.

In January 2003, SW Bell filed a motion for summary judgment, asserting that Arrington had failed to establish either that he suffered from a legally cognizable "disability" or that SW Bell's proffered reasons for firing him were pretextual. The district court agreed, and granted summary judgment in favor of SW Bell on both the disability discrimination and retaliation claims in May 2003. Arrington appeals both of these decisions.

## II. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo, applying the same standard as the district court. Seaman v. CSPH, Inc., 179 F.3d 297, 299 (5th Cir. 1999). Summary judgment is appropriate when the record demonstrates no genuine issue of material fact and where the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Although in our review of the record we must draw all reasonable inferences in favor of the nonmoving party, "[t]he moving party is entitled to a judgment as a matter of law [if] the nonmoving part has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). Moreover, we have stated that the nonmoving party does not demonstrate the existence of a genuine issue of fact (and does not thereby avoid summary judgment) by asserting some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, o by only a scintilla of evidence." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (citations and internal quotation marks omitted).

## III. DISCUSSION

### A. Disability Discrimination

A plaintiff may prove intentional discrimination under the ADA either by presenting direct evidence of discrimination or by utilizing the familiar McDonnell Douglas burden-shifting method of proof. Seaman, 179 F.3d at 300. Because Arrington provides only circumstantial evidence of discrimination, we review his claim under the latter standard. To establish a prima f facie case of disability discrimination, Arrington must show that he "(1) suffers from a disability; (2) was qualified for the job (3) was subject to an adverse employment action, and (4) was replaced by a non-disabled person or treated less favorably than non disabled employees." Id.; see also 42 U.S.C. § 12112(d) (2000).

The parties dispute whether Arrington has met his burden of proof regarding the first element of the prima facie case. Under the ADA, a "disability" is defined as

(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment .

42 U.S.C. § 12102(2) (2000). Arrington asserts that he meets either definition (A) or definition (B) because he suffers s from diabetes. n2 Specifically, he argues that this circuit held, in Gonzales v. City of New Braunfels, 176 F.3d 834, 837 (5th Cir. 1999), that insulin-dependent diabetes is a "disability" as that term is defined in the

ADA. SW Bell disagrees, and contends that Arrington must produce evidence suggesting that his diabetic condition "substantially limits" at least one of his "major life activities." See 42 U.S.C. S 12102(2)(A); EEOC v. R.J. Gallagher Co., 181 F.3d 645, 655 (5th Cir. 1999) (holding that, for a plaintiff to prove that he has a "record of impairment" under 42 U.S.C. § 12102(2)(B), "there must be a record of an impairment that substantially limits one or more of [his] major life activities").

SW Bell correctly identifies the flaws in Arrington's position. Gonzales does not stand for the proposition that diabetes is a disability per se; rather, Gonzales merely noted that, at that time, this circuit's precedents required a plaintiff's claim that he suffered a "disability" to be evaluated by considering the impact of the plaintiff's untreated impairment on his major life activities. 176 F.3d at 837. Under that test, the Gonzales court observed that insulin-dependent diabetes would qualify as a disability because, if someone with this disease is deprived of insulin, he will lapse into a coma. Id. But this observation was mere dicta, and the Gonzales court cautioned that the Supreme Court was currently considering whether disabilities should, in fact, be measured without reference to mitigating factors. Id. Thus, not only is this observation not binding precedent, but its logical force has been undermined by the Supreme Court's subsequent determination, in Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-83 (1999), that "(a) person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity." Instead, whether a person is disabled

under the ADA "depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting." Id. at 488. n3

In Toyota Motor Manufacturing, Kentucky v. Williams, 534 U.S. 184 (2002), the Supreme Court further clarified that "[i]t is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment"; instead, plaintiffs are required to offer evidence of the "extent of the limitation . . . in terms of their own experience." Id. at 198 (citation and internal quotation marks omitted). Therefore, because Arrington attempts to prove that he suffers from a disability simply by referring to his medical diagnosis of diabetes, Arrington's claim must fail. He has not explained, in either his opposition to summary judgment or his brief on appeal, how his diabetes has limited any of his major life activities.

Nevertheless, in his deposition, Arrington complained that, when he worked at SW Bell, his diabetes affected his "production." n4 Viewing the record in the light most favorable to Arrington, he may have been attempting to argue that his diabetes qualifies as a disability because it substantially limited his major life activity of "working." But this argument fails as a matter of law. While we have recognized that "working" is a major life activity for the purposes of the ADA, R.J. Gallagher Co., 181 F.3d at 654, this court has also explained that "[e]vidence of disqualification from a single position or a narrow range of jobs will not support a finding that an individual is substantially limited from the major life activity of working." Talk v. Delta Airlines, Inc., 165 f.3d 1021, 1025 (5th Cir. 1999):

accord Sutton, 527 U.S. at 491. Thus, because he does not claim that he was incapable of performing a range of jobs due to his diabetes, Arrington has not demonstrated that he has either a disability or a record of impairment under the ADA. n5

B. Retaliation

To establish a prima facie case of retaliation, a plaintiff must prove that (1) he engaged in an activity protected by the ADA, (2) he was subjected to an adverse employment action, and (3) a causal connection existed between his participation in the protected activity and the adverse employment action. Seaman, 179 F.3d at 301. Once the plaintiff has proven a prima facie case, the burden of production shifts to the defendant to come forward with a legitimate, non-discriminatory reason for the adverse employment action. Id. if such a reason is provided, then the plaintiff must proffer evidence that the given reason is pretextual. Id. In essence, the plaintiff "must show that 'but for' the protected activity, the adverse employment action would not have occurred." Id.

We need not decide whether Arrington has established a prima facie case of retaliation because he has failed to demonstrate a genuine issue of fact regarding whether SW Bell's legitimate, non-discriminatory reason for firing him was pretextual. SW Bell has provided evidence that Arrington was discharged due to his troubled performance history and the company's receipt of numerous customer complaints regarding Arrington's appearance, demeanor, and working skills. In addition, SW Bell has shown that, in an attempt to help Arrington improve his performance and prevent

his termination, SW Bell placed Arrington on five different Performance Improvement Plans, offered him assistance from the company's Employee Assistance Program (he declined), and offered him two days of ride along" assistance from a training manager (he refused to participate on the second day). Yet, after he was placed on one year of probation and warned that further problems would warrant immediate dismissal, Arrington was the subject of another customer complaint. But because Arrington's difficulties were centered on interaction with customers and his level of productivity, SW Bell asserts and Arrington concedes, that instead of being immediately fired he was offered the Supplies Attendant position, which he declined. Thus, SW Bell has met its burden of providing a legitimate, nondiscriminatory reason for discharging Arrington.

In rebuttal, Arrington provides only a scintilla of evidence that SW Bell's proffered reasons are pretextual. Arrington on claims that, after he returned to work in 1997, SW Bell unfairly disciplined him for his poor performance while the company's other employees with similar productivity levels were no disciplined. For support, Arrington provides a statement from Clay Everett, Arrington's union supervisor, that refers to Arrington's job productivity as in the "middle of the pack" compared to other SW Bell employees. n6 Yet, both Everett and Arrington have also admitted that Arrington was once one of the slowest employees in Midland and that, although his performance was improving, he had not achieved the "mark where he needed to be" before he was terminated.

In addition to contesting SW Bell's view of his productivity, Arrington alleges that the customer complaints lodged against him were improperly solicited by SW Bell's employees. But other than the Prickle incident, where Arrington challenged his supervisor to call the customer and check that he was really working at her home, Arrington provides no evidence to support his claim of solicitation. The remainder of Arrington's examples of disparate treatment--that he was sent home for wearing footwear that another CST was allowed to wear, that he was given an un-air-conditioned van rather than the cable truck driven by other CSTs, that his tools were substandard, that his supervisors made rude comments about his age and productivity, and that he was subjected to more extensive medical evaluations than his fellow CSTs--are not relevant to the issue at hand: whether SW Bell's explanation that Arrington was fired for poor productivity and customer complaints is merely pretext for retaliation.

In support of his claim of pretext, Arrington also contends that SW Bell did not follow its standard practice of allowing a union supervisor to investigate the customer complaints lodged against him. Arrington buttresses his argument by pointing out that Everett has similarly expressed his belief that the final customer complaint, involving Prickle, was not "objectively" investigated. n7 Moreover, Arrington and Everett dispute SW Bell's version of the Prickle incident, asserting that the customer was mainly upset that Arrington did not complete the job, which they believe was caused by his ineligibility to work overtime. Yet, the summary-judgment record contains admissions from both Arrington and Everett that Arrington did

not use an official SW Bell code when he filed the paperwork regarding his inability to complete the Prickle job, although neither thinks that this "offense" was serious.

Viewed in its entirety, Arrington's evidence of pretext and retaliatory treatment is insufficient to permit a reasonable jury to conclude that Arrington would not have been terminated "but for" his filing of an EEOC complaint in 1996. Arrington fails to identify any similarly situated employees (i.e., those with a history of numerous customer complaints and a similarly low productivity level) who were neither disciplined nor discharged for their poor job performance. Arrington believes that he was not a poor CST, but "[m]erely disagreeing with an employer's negative performance assessment is insufficient to show pretext." Perez v. Region 20 Educ. Serv. Ctr., 307 F.3d 318, 325 (5th Cir. 2002). Moreover, Arrington's subjective belief that SW Bell solicited the customer complaints, without more, is also insufficient to cast doubt on SW Bell's proffered reason for his termination. See Auguster v Vermilion Parish Sch. Bd., 249 F.3d 400, 403 (5th Cir. 2001) ("This court has consistently held that an employee's 'subjective belief of discrimination' alone is not sufficient to warrant judicial relief." (citations omitted)). n8 Therefore, the district court properly held that SW Bell was entitled to summary judgment on Arrington's retaliation claim.

## IV. CONCLUSION

Accordingly, we AFFIRM judgment of the district court.

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has deter mined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

n2 Arrington concedes that he was not regarded as disabled.

n3 Moreover, Sutton specifically cautioned that assessing diseases in their untreated state would require courts to, for example, treat all diabetics as disabled per se, a result which the Court noted "is contrary to both the letter and the spirit of the ADA." 527 U.S. at 484: see also Waldrip v. Gen. Elec. Co., 325 F.3d 652, 656 (5th Cir. 2443) ("[N]either the Supreme Court nor this court has recognized the concept of a per se disability ability under the ADA . . . .").

n4 Additionally, in his motion for summary judgment, Arrington stated that SW Bell should have accommodated his disability by allowing him additional time to complete his jobs. But Arrington also conceded that he never requested that SW Bell provide him with any reasonable accommodations.

n5 To the extent that Arrington's response to SW Bell's motion for summary judgment can be read to imply that the diabetic foot ulcers on his feet substantially limited his major life activity of "walking," it fails as a matter of law. Cf. Talk, 165 F.3d at 1025 (holding that a plaintiff's ability to walk was not substantially limited simply because she walked with a

limp, moved slower than other people, and was required to wear special orthopedic shoes).

n6 Everett's statement refers to a document comparing the number of jobs performed per day by many of SW Bell's employees. Because this document has not been made a part of the summary judgment record, it is impossible for this court to know whether that document compared a variety of SW Bell's statewide employees, only SW Bell's CSTs or, more specifically, only those CSTs who worked in the Midland office in addition, the record does not reflect whether any of the employees on this list were subject to discipline nor does it reflect the number of customer complaints associated with each employee.

n7 Everett did not claim to have personal knowledge that the other customer complaints lodged against Arrington were improperly investigated.

n8 The one factor in Arrington's favor is his evidence from Clay Everett, who also believes that Arrington was treated unfairly. Yet Everett admitted that Arrington had a history of poor productivity and customer complaints, and he did not claim to have personal knowledge that the complaints against Arrington were either baseless or solicited by Arrington's supervisors at SW Bell.

MO-00-CA-057

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS MIDLAND-ODESSA DIVISION

DICK W. ARRINGTON,
Plaintiff

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant

Filed May 12, 2003

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is the Defendant's Motion for Summary Judgment, filed on January 6, 2003, in the above numbered and styled cause. The Plaintiff's Memorandum and Opposition to Defendant's Motion for Summary Judgment was filed on February 14, 2003. The Defendant's Reply to Plaintiff's Response to Motion for Summary Judgment was filed on March 18, 2003. Finally, on March 27, 2003, the Court held a hearing on the Defendant's Motion for Summary Judgment. After due consideration of the filings of the parties, as well as the arguments made at the hearing on March 27, 2003, the Court is of the opinion that the Motion for Summary Judgment be GRANTED.

## STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P.56(c). The moving party has the burden of showing that there is no genuine issue as to material fact. Willis v. Roche Biomedical Lab., Inc., 61 F.3d 313, 315 (5th Cir.1995). Once the movant carries this burden, the burden shifts to the nonmovant to show the existence of a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-26 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita, 475 U.S. at 587. If the record, viewed in that light, could not lead a rational trier of fact to find for the nonmovant, summary judgment is proper. Kelley v. Price Macemon, Inc., 992 F.2d 1408, 1413 (5th Cir. 1993), cert denied, 510 U.S. 1043 (1994)(citing Matsushita, 475 U.S. at 577-78).

## FACTUAL BACKGROUND

The Plaintiff, a diabetic, was an employee of the Defendant Southwestern Bell Telephone Company from 1974 to 1998. From 1979 onwards, the Plaintiff's designation at Southwestern Bell was "Customer Service Technician," or "CST." The CST position involved the installation and repair of phones and phone lines. In 1986, the Plaintiff was apparently diagnosed

with diabetes. Beginning in 1987, numerous complaints were lodged pertaining to the Plaintiff's physical appearance and work performance. See App. Def's. Mot. Summ. J. Ex.3 at 4-10. The Plaintiff stated at the hearing on March 27, 2003 that he does not contest the fact that he was reprimanded several times during his tenure at Southwestern Bell.

In 1995, the Plaintiff developed diabetic ulcers and had to take leave from his job. Following a dispute with Southwestern Bell as to his date of return to work, the Plaintiff was apparently discharged from his employment. He then filed a complaint with the Equal Employment Opportunity Commission (EEOC) on September 9, 1996. However, a general settlement agreement was reached between the parties and the Plaintiff was reinstated in his previous job at Southwestern Bell in 1997.

Subsequent to his reinstatement, the Plaintiff continued to receive complaints from customers about either his appearance or his work performance. One such incident in 1997 let to Southwestern Bell's management placing the Plaintiff on "Decision Making Leave," a one-year probationary period during which the Plaintiff was subject to dismissal for unsatisfactory performance of his job duties. On June 25, 1998, another customer filed a complaint dealing with the Plaintiff; he was therefore suspended on the same day. At that point, the Defendant's management offered the Plaintiff a position as "Supplies Attendant," a job that did not involve the CSTs customer contact or productivity requirements. When the Plaintiff refused this alternate employment at Southwestern Bell, the Defendant proceeded to recommend his permanent

dismissal from the company. On November 12, 1998, the Plaintiff was terminated from his employment at Southwestern Bell.

DISCUSSION

The Plaintiff alleges that he was intentionally discriminated against in violation of the Americans with Disabilities Act (ADA). He also alleges that he suffered retaliation in the workplace and was ultimately discharged as a result of his filing and EEOC compliant in 1996.

A. ADA Claim

In his Americans with Disabilities Act claim, the Plaintiff states that he was discriminated against at work and was terminated due to his insulin-dependant diabetes. In order to make out a claim of discrimination under the ADA, a plaintiff may either present direct evidence or utilize the indirect method of proof propounded in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the latter approach, a prima facie case of intentional discrimination is established by showing: (1) the plaintiff suffers from a disability; (2) the plaintiff was qualified for his or her job; (3) the plaintiff was subjected to an adverse employment action; and (4) the plaintiff was replaced by a non-disabled person or was treated less favorable than non-disabled employees. See Seaman v. CSPH, Inc., 179 F.3d 297, 300 (5th Cir. 1999).

In his response to the Defendant's Motion for Summary Judgment, as well as the hearing on March 27, 2003, the Plaintiff conceded that his ADA cause of action

probably could not survive summary judgment under the current state of the law. Pl.'s Mem. Opp'n. Def.'s Mot. Summ. J. at 13-1; see Murphy v. United Parcel Service Inc., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). Accordingly, the Court finds that there is no genuine issue of material fact as to this claim.

B. Retaliation Claim

The Plaintiff alleges that he was retaliated against in response to the EEOC complaint he filed in 1996. More specifically, the Plaintiff claims (1) that he was treated differently from other employees at work subsequent to the filing of the EEOC complaint, and (2) that his eventual termination was also due to the filing of the complaint.

In order to make out a prima facie case of retaliation, the Plaintiff must show that: (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) a casual connection existed between the protected activity and the adverse employment action. Seaman, 179 F.3d at 301. Once a prima facie case is established, the Defendant must come forward with a legitimate, non-discriminatory reason for the adverse employment action. Id. At that point, the burden shifts back to the Plaintiff to produce sufficient evidence that the Defendant's proferred reason is merely a pretext for retaliation. Id.

In this case, the Court need not decide whether the Plaintiff has established a prima facie case of retaliation, because he has not produced sufficient evidence that the Defendant's legitimate, non-

discriminatory reason for any of its actions, including firing him, was pretextual. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000). The Defendant asserts that the Plaintiff was terminated because of his poor job performance and history of customer complaints. A mere scintilla of evidence of pretext will not create an issue of material fact in all cases. Crawford v. Formosa Plastics Corp., 234 F.3d 899, 903 (5th Cir. 2000). Thus, to satisfy his burden to show pretext, a plaintiff's evidence that the proferred reason is unworthy of credence must be enough to support a reasonable inference that the proferred reason is false; a mere shadow of a doubt is insufficient. Auguster v. Vermilion Parish Sch. Bd., 249 F.3d 400, 403 (5th Cir. 2001)(citation omitted). The Fifth Circuit has held that "an employee's subjective belief of discrimination alone is not sufficient to warrant judicial relief." Id.

Even assuming that the Plaintiff has set forth a prima facie claim of retaliation, the Court finds that there is no genuine issue as to material fact that the Defendant's proferred reason for its adverse employment action(s) towards Mr. Arrington was a pretext for retaliatory conduct. The Plaintiff's work history is well-documented in the summary judgment evidence, and it is clear from the record that the Plaintiff was reprimanded several times for his poor work performance. The Plaintiff has not produced substantial evidence that this proferred reason for termination – poor work performance – was a pretext for retaliation, as required by the McDonnell Douglas burden-shifting framework. Rather, he has merely asserted in a conclusory fashion that the various complaints filed against him were solicited by the

company. The Court also finds unpersuasive the Plaintiff's arguments that similarly situated employees of Southwestern Bell were treated differently from him for nearly identical misconduct. Accordingly, the Court concludes that the Defendant is entitled to judgment as a matter of law on the Plaintiff's retaliation claims as well.

CONCLUSION

For the reasons mentioned above, the Court is of the opinion that there is no genuine issue as to material fact warranting a trial in this cause. Accordingly,

It is ORDERED that the Defendant's Motion for Summary Judgment is hereby GRANTED.

Signed this 11th day of May, 2003.

ROBERT JUNELL
UNITED STATES DISTRICT JUDGE

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*** CURRENT THROUGH P.L. 228, APPROVED 5/18/04 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES EMPLOYMENT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

42 USCS § 12112 (2004)

§ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen

out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries.

(1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation.

(A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control,

of the employer and the corporation.

(d) Medical examinations and inquiries.

(1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment.

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical

files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4) Examination and inquiry.

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

**HISTORY:** (July 26, 1990, P.L. 101-336, Title I, § 102, 104 Stat. 331; Nov. 21, 1991, P.L. 102-166, Title I, § 109(b)(2), 105 Stat. 1077.)